

WORKERS' COMPENSATION ADVISORY COUNCIL

**MINUTES ~ ~ DECEMBER 13, 2001 MEETING [9:30 A.M.]
710 JAMES ROBERTSON PARKWAY
HEARING ROOM, FIRST FLOOR
ANDREW JOHNSON TOWER
NASHVILLE, TENNESSEE**

The meeting was called to order by Mr. Dale Sims, Designee for the Chair, Mr. Steve Adams, State Treasurer.

Voting members in attendance:

Mr. Jack Gatlin
Mr. Dave Goetz
Mr. James G. Neeley
Mr. Bob Pitts
Mr. Othal Smith, Jr.
Mr. Steven Turner

Nonvoting members in attendance:

Ms. Kitty Boyte
Ms. Jacqueline Dixon
Mr. Tony Farmer
Ms. Abbie Hudgens

Ex officio members in attendance:

Senator Joe Haynes
Mr. Walter Butler, Deputy Commissioner, Department of Labor and Workforce
Development [designee for Commissioner Michael E. Magill].
Mr. Everett Sinor, Assistant Commissioner, Department of Commerce & Insurance
[designee for Commissioner Anne Pope]

Also present:

M. Linda Hughes, Executive Director
Mr. Dave Wilstermann, Research Analyst

Mr. Sims called the meeting to order. The minutes of the meetings on July 26, September 13 and October 16 were approved.

NEW BUSINESS

A. REVIEW OF PROPOSED REVISION TO STATISTICAL DATA FORM

Ms. Hughes explained the Department of Labor and Workforce Development has revised the Statistical Data Form and the Advisory Council is required by statute to review proposed changes and to submit any comments to the Commissioner. She also stated Advisory Council staff had worked with the Department in revising the form. The proposed revised form was discussed and no specific comments were made for changes. After discussion, the voting members of the Advisory Council voted unanimously to recommend the revised Statistical Data Form be adopted.

B. REPORT RE: STATUS OF SECOND INJURY FUND SETTLEMENT AUTHORITY

Mr Bill Calhoun, attorney with the Second Injury Fund, reported to the Advisory Council that the Second Injury Fund attorneys have been given a dollar amount of settlement authority for the cases in which the Second Injury Fund is involved. He stated the amount of authority is more than nuisance value and will vary by each individual case. Mr. Calhoun explained that had the settlement authority it been in effect in the past year, it would have allowed the settlement of 50% of the cases in which the Fund was involved.

C. PRESENTATIONS CONCERNING BOTH PENDING ANTICIPATED WORKERS' COMPENSATION LEGISLATION

Prior to the December meeting, the Advisory Council invited all legislators and other interested parties to attend the December 13 meeting to discuss any issue about which legislation might be introduced or pursued during the remainder of the 102nd General Assembly. In addition, legislation pending from the 2001 Session was also discussed.

As the focus of this portion of the meeting was to allow the Advisory Council to become familiar with the issues of interest to stakeholders for the upcoming legislative session and to review the legislation that was still pending before the Legislature, the presentations were limited to discussion of the issues and no action was taken by the Advisory Council members on the various proposals.

The following issues related to legislation still pending from the 2001 Legislative session were discussed:

1. SB277(Haynes) / HB786(Briley) - Bill related to permanent total disabilities and mental injuries.

Ms. Hughes explained during the 2001 legislative session the bill was amended to delete all portions of Section 207(ff) except for “total loss of mental faculties” from the scheduled injuries portion of the law. The bill, as amended, passed the Senate and passed the House committee; however, it did not reach the floor due to the fiscal note on the bill and the budget constraints. The interested parties had agreed during the prior session to continue discussions regarding how to handle the issue of “mental faculties” and “mental injuries”; therefore, the issue was placed on the agenda for further discussion among the members of the Advisory Council.

Representative Rob Briley, co-sponsor of the legislation to remove “mental faculties” from the schedule was recognized by the Chair. Rep. Briley explained his desire to develop a procedure by which those employees who suffer a mental injury due to a physical injury or as a sole mental injury can be fairly compensated. He expressed his opinion that the Supreme Court and the other courts should have the guidance of the legislature in the defining of compensable mental injury claims.

Mr. Dave Goetz explained that the concern of the business community is the apparent expansion by the courts in the area of coverage of mental injury claims. Mr. Goetz requested recognition of Joel Reismann, M.D., a psychiatrist from Memphis to assist the Advisory Council in additional understanding of the issue.

Dr. Reismann stated he has been practicing psychiatry since 1973 and for 12-15 years he has been working with workers' compensation cases - 50% of his time is spent as a treating psychiatrist and the other half as an evaluating psychiatrist. He explained the biggest problem in this area stems from the fact that psychiatrists are not trained in medical school in the treatment of workers' compensation patients. This problem is evident when treating physicians also become the doctor who assigns a permanent impairment to the patient. Dr. Reismann stated an evaluation for the purposes of treatment is totally different from an evaluation for the purpose of determining causation and permanency. In his opinion, to develop an impairment rating, the doctor must look at the degree of function the patient has not just the diagnosis of the patient's condition. A treating physician's focus of treatment is to alleviate the symptoms not in getting the patient back to work.

Mr. Goetz stressed the focus of this issue should be an independent evaluation as the treating doctor is focused on all the patient's issues, not just the ones which relate to the work related injury and he would like to work with the Tennessee Psychiatric Association to develop an independent medical evaluation system that trains the doctors in the protocols of independent evaluation.

Dr. Reismann indicated the injury alone is not the problem in dealing with emotional cases, the problem is what comes after the injury and he refers to this as the “hassle factor”. Often patients feel they are not treated fairly by the insurer, employer or the doctor chosen by the employer. The longer the workers' compensation claim is drawn out, the worse it is on the patient. In his opinion,

when the litigation ends, the patient will get better because the process itself is stressful. He stressed this is not a function of a “greenback poultice”. He advocated education for the case managers, insurance adjusters and employers as he has seen few patients who are actually malingering. Often, however, they may exaggerate their symptoms, but this is a result of feeling they are under attack and feeling they must defend themselves and this results in an exaggeration.

Mr. Goetz requested a commitment from the interested parties in addressing the issue of “mental injuries” in the 2002 General Assembly. Mr. Neeley pointed out this issue is separate from the issue of taking the severe cases (loss of both arms, paralysis, etc.) out of the scheduled injury section of the statute. He did agree the parties need to address a process to deal with the issue of mental faculties.

2. SB1398(Haynes) / HB1642(Turner-Shelby) - Bill related to changing the word “arm” in *TCA* §50-6-207(3)(A)(ii)(m) and (o) to the words “upper extremity” and to change the maximum number of weeks of benefits from 200 weeks to 300 weeks.

It was explained this change is necessary because the AMA Guides uses the term “upper extremity” instead of the word “arm” for impairment ratings, yet the law requires the use of the AMA Guides which is inconsistent with the schedule for injuries to the arm. Employer representatives of the Advisory Council pointed out the legislation would also increase the maximum award possible for these injuries. Also discussed was the possibility of converting all “upper extremity” injuries to body as a whole injuries.

3. SB1406(Haynes) / HB1641(Turner-Shelby) - This bill would allow an employee who sustains complete permanent loss of hearing in both ears to be eligible for permanent total disability.

Mr. Farmer explained that an employee who has total loss of hearing should not be limited to permanent partial disability benefits if the employee was totally incapable of earning an income after suffering the injury.

4. SB1405(Haynes) / HB1643(Turner-Shelby) - This bill would allow a court to order the commencement of temporary total disability and medical benefits.

It was explained to the members that current statutes permit these benefits to be commenced only by order of a workers’ compensation specialist. Mr. Farmer explained some courts in East Tennessee feel they have the authority to order the payment of these benefits and routinely do so. Therefore, there is not uniformity on this issue across the State of Tennessee. Also discussed was whether the Department has authority to order specific medical treatment. Ms. Sue Ann Head

explained that according to an opinion of the Attorney General the Department does not have the authority to order the employer or insurer to provide a specific medical treatment.

The following issues were presented to the Advisory Council as possible workers' compensation legislation for 2002:

1. Delete the Manual for Orthopedic Surgeons in Evaluating Permanent Physical Impairment as a permissible guide for rating impairments.

Mr. Bill Calhoun, attorney for the Second Injury Fund, explained that the Manual for Orthopedic Surgeons has not been published for several years and that it is used by very few physicians when asked to give an impairment rating. He also explained that an individual cannot purchase a copy of the Manual. Ms. Kitty Boyte pointed out that attorneys for employers/insurers also use the Manual.

2. Revise the rating factors to be utilized in the calculation of the loss cost multiplier and defining "small deductible".

This proposal was made by insurance company representative member, Mr. Jerry Mayo, who was unable to attend the meeting. Mr. David Broemel made the presentation on behalf of the insurance industry. The proposal was to amend *TCA* §56-5-306 to provide the "applicable rating factors" to be provided re: calculation of the loss costs multiplier shall include schedule rating and small deductible credits. Also, it was suggested the term "small deductible" should be defined as a definition is not provided and the forms required to be filed with the Department of Commerce and Insurance use the term.

3. Evaluate the limitation on the number of chiropractic visits allowed when an employee chooses a chiropractor as the treating medical care provider.

The members discussed the issue of chiropractic treatment for back injury cases. It was pointed out by Ms. Boyte that only a small number of employees choose the chiropractor as the treating physician. The issue of what happens after the "12 visit limit" is exhausted. Opinions among the members were varied as to whether the employer/insurer is required to provide medical treatment to the employee after the 12th visit.

4. Require disability benefit checks to be mailed to the employee or employee's designee.

Mr. Goetz explained the employers who ask the employee to come to the workplace to receive the check do so in order to keep the employee in the habit of coming to work. Mr. Turner indicated an interest in the employee understanding that it is the employer who is providing the

benefits. Ms. Boyte also explained it is sometimes difficult to prove in court that the correct benefits have been paid to and received by the employee if the checks are mailed. She said requiring an employee to pick up the check and sign a receipt for it makes it easier to prove the benefits have been paid. Other members pointed out making an injured employee drive to get benefits to which the employee is entitled can be used for the purpose of harassing an employee.

5. Provide that temporary partial disability benefits are to be calculated on the difference between the average weekly wages rather than the “wages” earned at time of injury and the earnings of the employee in the disabled condition.

This issue was raised due to a recent decision of the Supreme Court. The members noted an employee should not be paid more in temporary benefits than the employee would have made working at his regular employment. Staff was requested to work out different examples of how this opinion would be applied in the workers’ compensation arena.

6. Clarify the entity or person who shall bear the responsibility to pay medical expenses incurred by an injured employee who tests positive for drugs.

Mr. Scott Smith, representing Vanderbilt University, explained to the Advisory Council that Vanderbilt has experienced problems with recovery for emergency medical treatment provided to employees injured on the job but who test positive for drugs or alcohol. He explained that the employers are denying the claim is compensable and are refusing to pay the medical expenses. In addition, the group medical coverage often has an exemption for injuries that occur on the job or are work-related and as a result the group carrier refuses to pay the medical expenses. As a result, Vanderbilt is unable to recover the costs of the medical treatment provided.

Mr. Pitts expressed concern that the group health insurer is not obligated to pay these expenses. Mr. Turner stated he did not feel the employer should be obligated to pay medical expenses due to the illegal use of drugs or alcohol in a work environment that had a policy against drug use. It was explained there are two issues involved: an employer which has a certified “drug-free workplace program” and an employer that has a drug-free policy but is not a certified program.

Mr. Farmer stated for an employer to deny benefits for a positive drug or alcohol test the injury must be caused by the intoxication.

7. Increase the numerical triggering mechanism for the Assigned Risk Plan to incorporate consideration of temporary swings in the insurance market.

Ms. Mandy Young, representative of NAIL, was recognized to discuss this issue. She stated because of the current recession and the volatility of the market after the September 11th terrorist attacks that the workers’ compensation insurance market is hardening. She explained the NAIL

would like to see the law amended to raise the assigned risk trigger to 20% before action is required and to give the Commissioner of Commerce and Insurance the authority to take no action if the assigned risk plan exceeds the trigger.

8. Change the period of disability benefits for injuries occurring after age 60 to be equal to 260 weeks or the number of weeks from the employee's 60th birthday until the full retirement age, whichever is greater.

Mr. Farmer explained that the law should be consistent and if an individual is entitled to receive permanent total disability benefits until the age for full retirement benefits it is only fair that those individuals over age 60 not be limited to 260 weeks if the number of weeks until the age of full retirement benefits is greater than 260 weeks.

9. Limit employee attorneys' fees by calculating the fees on the amount awarded in excess of the last offer by the employer/insurer at a benefit review conference.

Mr. Goetz stated the proposal applies only to the difference in the amount recovered after the offer made pursuant to the Claims Handling Standards that require the employer/insurer to make an offer to the injured worker within 30 days of the date of maximum medical improvement, whether the employee has an attorney or not. The proposal would limit the attorney's fee to the difference between this "MMI offer" made by the employer/insurer and the amount the claimant receives by way of either settlement or trial. Mr. Smith stated that this proposal would not recognize the contribution of an attorney's time in representing the employee prior to the first offer. In addition, Mr. Smith indicated this would not be a proposal that encourages settlements and it also presumes the attorney controls the decision as to whether to accept the settlement offer or not. Ms. Boyte pointed out that often an attorney has already been retained and the case in litigation prior to the offer that is required by the Claims Handling Standards.

10. Apply the "2½ maximum multiplier cap" to scheduled member injuries when the employee returns to the pre-injury job at the same or greater pay.

Mr. Goetz explained this proposal would apply the same statutory limits to a scheduled member injury (where the employee returns to the pre-injury job at higher or equal pay) as is applied to body as a whole injuries. He stated there are areas in Tennessee in which the employee who has a more severe body as a whole injury receives less than an employee who has a scheduled injury and this is inequitable. Mr. Smith stated this proposal would place an additional limit to injuries that are already limited by the schedule.

11. Provide an independent medical examination procedure for determination of impairment ratings to be administered by the Department of Labor and Workforce Development.

Mr. Goetz explained this proposal would require an independent medical examination [IME] of the injured employee when more than one physician has given an impairment rating. The Advisory Council's statistical analyst, David Wilstermann, reported that SD-1 data from 11,000 claims in 2000 and 2001 data indicate approximately 25% of the claims involve more than one physician; however not all of these give an impairment rating. In addition, the data showed 83.5% of the claims had only a treating doctor; 14% of the claims had a treating and an employee IME; 2% had a treating physician and an employer IME and only 0.5% had all three types (a treating and two IMEs).

Ms. Boyte suggested this proposal would cut a lot of costs in the system because if an employee feels it is necessary to obtain an IME, the employee has to pay for the IME, an additional deposition is necessary and this adds to the discretionary costs which the employer is required to pay. Mr. Neeley suggested the employee should have the right to pick the IME as the employer had the option of providing the first panel choice of physicians. Mr. Goetz said this should apply only to cases that are in litigation and only in cases in which there is a dispute as to the impairment rating. Mr. Farmer objected to the limitation on the employee's right to select the IME physician.

12. Provide that only the "most recent edition of the AMA Guides is admissible in court in workers' compensation actions.

Mr. Goetz stated this proposal arose as a result of some courts allowing into evidence impairment ratings based on outdated AMA Guides, instead of the most recent edition. Mr. Smith stated the proposal should clarify the Guide that should be used is the one in effect at the time of the evaluation of the employee. Mr. Sims pointed out that the parties should consider whether there should be a more specific date that would define the "most recent edition". Mr. Turner suggested the language "the most recent edition as designated by the Department" and then the Department can determine the date.

13. Establish the proper venue for any suit for "reconsideration" of a settlement agreement approved by the Department of Labor and Workforce Development.

Ms. Hughes reported this item was on the agenda to advise the members that the Supreme Court had recently determined under the "reconsideration statute" the suit must be filed in the same court that approved the settlement. She suggested the statute may need to be clarified as to which court should have the venue for cases in which the Department had approved the original settlement and no complaint had been filed prior to settlement. Mr. Goetz suggested the parties should be required to go to the Department.

Ms. Hughes pointed out that the "reconsideration statute" does not grant authority to the Department to determine the degree of disability upon reconsideration. Mr. Goetz suggested the

statute require a party seeking reconsideration to first seek the assistance of the Department in mediation. If that fails, then the employee would be required to file suit in the court which would have had venue at the time of the original injury. Mr. Smith objected to this venue application. Ms. Dixon suggested the use of the applicable venue statute in the workers' compensation law.

15. Determine whether the Second Injury Fund should be entitled to the social security offset which is available to an employer.

Ms. Hughes reported this issue was placed on the agenda in order to make the members aware of a recent Supreme Court opinion that held the Second Injury Fund is not entitled to an offset because the statute does specifically apply to the Second Injury Fund. She read a portion of the opinion in which the Court suggested the legislature should consider this policy change. Mr. Pitts suggested this should be done. Mr. Smith suggested this would reduce the amount of money received by the employee.

D. OTHER MATTERS

Mr. David Broemel was recognized to address information he had provided to the members in their meeting materials. He indicated concerns that medical costs have increased 113% and the insurance industry suggests a need for stronger tools to control medical costs.

Mr. Pitts was recognized. He remarked that the members should keep in mind while the most recent loss costs filing was not dramatic, it appears that the market is hardening significantly. He stated the business community will face a situation in the next six (6) months in which workers' compensation premium costs will be significantly higher, availability will be significantly less and reinsurance will be a major problem if it can be obtained at all. He stated it was his position for the upcoming legislative session not to support any legislation which tends to further increase costs to the system in such an uncertain insurance market. Mr. Neeley inquired as to what this situation says about Tennessee's unregulated market. Mr. Goetz suggested most of the changes leading to the current market conditions were a result of factors outside of Tennessee, including the terrorist attacks of September 11.

Mr. Goetz also reported Tennessee has the highest prescription usage per capita (14) of any state in the country according to a study by BlueCross/BlueShield. Mr. Neeley noted workers' compensation is the last area in which the medical care providers receive what they charge and this leads to increasing costs.

The meeting was adjourned at 2:40 p.m.